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No. 07-751

In The
Supreme Court of the United States

CORDELL PEARSON, et al.,

Petitioners,

v.

AFTON CALLAHAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF LIBERTY LEGAL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT AFTON CALLAHAN

KELLY J. SHACKELFORD
Counsel of Record
HIRAM S. SASSER, III
ROGER L. BYRON
LIBERTY LEGAL INSTITUTE
903 E. 18th, Ste. 230
Plano, Texas 75074
Telephone (972) 423-3131
Facsimile (972) 423-6570

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICUS CURIAE[1]

Liberty Legal Institute ("LLI") is a non-profit civil rights law firm dedicated to the preservation of freedoms enumerated in the Bill of Rights. LLI focuses most of its civil rights practice on the preservation of First Amendment liberties, including the vigorous protection of free speech. LLI and its attorneys have argued for broad protection for speech and religious practice. *See, e.g.*, *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (LLI represented Respondent seeking to preserve the right of candidates to participate in public debate forums); *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (LLI filed an amicus brief seeking to preserve student speech protections); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (LLI filed an amicus brief seeking to strengthen strict scrutiny analysis under the Religious Freedom Restoration Act).

In the present case, LLI is concerned that the erosion of the *Saucier*[2] test in qualified immunity cases will result in the weakening in the rule of law and of civil rights protections of every American. Thus, LLI joins Respondent in urging this Court to uphold the *Saucier* analysis and, alternatively, to

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[1] All parties of record consented to the filing of this brief. Amicus states that no portion of this brief was authored by counsel for a party and that no person or entity other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Saucier v. Katz*, 533 U.S. 194 (2001).

introduce minor modifications to the *Saucier* test that will still allow for the rigorous enforcement of civil rights law Congress intended.

SUMMARY OF THE ARGUMENT

This Court's decision in *Saucier*, should be upheld. Prior to *Saucier*'s requisite order of analysis, crucial areas of the law often remained unclear and undefined from case to case. The courts were not required to evaluate the constitutionality of a claim when qualified immunity was at issue. A perpetual game, whether intentional or not, could be played. Despite an actual violation of the Constitution, a Court could say the right at issue was not clearly established at the time of the violation. The Court could then also refuse to define the right and thus ensure perpetual violations could continue with no redress. Consequentially, the applicable law was never "clearly established." Qualified immunity was then repeatedly and unalterably granted for similar egregious constitutional violations with no hope for redress. *See*, *e.g.*, Section I-A, *infra*.

Saucier corrected the problem of perpetually unenforceable civil rights by requiring the courts to decide the constitutionality of a claimed right before ruling on qualified immunity.[3] Far from compromising

[3] Already *Saucier* can be credited with successful civil rights protections in numerous cases. *See, e.g.*, Section I-B, *infra*.

any rights of government officials, *Saucier* provides the engine for the law's elaboration and clear establishment for future cases that arise under similar circumstances. As a natural outworking of this ordered analysis, *Saucier* works to mitigate erroneous awards of qualified immunity[4] by securing the clear establishment of the applicable law, thus ensuring the non-recurrence of similar error in future cases. This mitigatory result is crucial to the continued efficient operation of the judiciary as this Court cannot review every erroneous award of qualified immunity by the lower courts.

When Courts do not enforce the rule of law, they are making a public policy decision and supplanting the will of Congress, contrary to their role in our constitutional form of government. Congress enacted 42 U.S.C. § 1983. Congress, the elected representatives of the people, made a public policy decision to ensure actual redress for constitutional rights violations. Avoiding the redress of actual violations disrespects that public policy decision, contributes to lawlessness and subverts the Constitution. *Saucier* is a procedural safeguard of deference to the Congressional mandate of enforcement embodied by Section 1983; overruling *Saucier* usurps Congressional power and replaces the will of the people with the will of a Court which then decides on its own whether it will

[4] An outstanding example of the erroneous award of qualified immunity is found in *Hope v. Pelzer*, 240 F.3d 975 (11th Cir. 2001), *rev'd by*, 536 U.S. 730 (2002).

allow future protection for an actual constitutional violation.

ARGUMENT

I. *Saucier* should be upheld.

Since this Court's rejection of a governmental theory of *respondeat superior*, *Monell v. Dept. of Social Services of the City of New York,* 436 U.S. 658 (1978), suits against officials in their personal capacity are the citizen's main recourse for constitutional violations arising under official discretion. When prospective relief is unavailable or insufficient, winning such suits entails overcoming qualified immunity, which was instituted to protect government officials acting in good faith under unclear law. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). There are certain classes of cases, however, where almost *all* constitutional violations arise under official discretion – e.g., child seizure cases,[5] discriminatory zoning cases[6] and discriminatory hirings.[7] In such cases, prior to *Saucier*, because constitutional merits were

[5] *See, e.g., Jordan v. Murphy*, 145 Fed. Appx. 513 (6th Cir. 2005).

[6] *See, e.g., Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994).

[7] *See, e.g., Barrow v. Greenville Indep. Sch. Dist.*, 480 F.3d 377 (5th Cir. 2007) (holding that a Texas school district could not be sued for discriminatory hiring practices by a superintendent – the final decision maker).

never reached and the law never clarified, qualified immunity could be granted perpetually for similar and repeated gross violations. These violations were effectively beyond the reach of Section 1983,[8] subverting the very purpose for the passage of Section 1983. *See Monell*, 436 U.S. at 686 n. 45.

Saucier's fixed-order two-step analysis corrected this inequity by requiring the courts to rule on whether a constitutional right has been violated regardless of the outcome of the qualified immunity claim. This both clearly defines established rights and ensures those rights are not perpetually violated under the auspicious guise of qualified immunity. These inalienable rights are important and deserve broad protection; "Congress, in enacting § 1 [of the Civil Rights Act of 1871], intended to give a broad remedy for violations of federally protected civil rights." *Monell*, 436 U.S. at 685. Indeed, the intent of Section 1983 was to ensure that citizens not be deprived of the protection of these rights but that they remain protected and valued.

It was not the purpose of qualified immunity to support an unchecked disregard for the law on the part of government officials, and allowing it to do so is grossly inconsistent with both the language and the rule of law. *Cf. Monell*, 436 U.S. at 683-87. This is, however, the inescapable effect of *Monell* and *Harlow* working in tandem without the intervention

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[8] 42 U.S.C. § 1983 (hereinafter "Section 1983").

of *Saucier*. *Saucier* successfully relieves the natural tension between a citizen's right to sue for relief of a constitutional violation and the ability of government officials to perform their duties in good faith, untrammeled by meritless lawsuits. By requiring adjudication of the constitutional claim in a case while upholding the clear law standard, *Saucier* provides ample protection for officials acting in good faith while allowing the elaboration and protection of civil rights as intended by Congress with the passage of Section 1983. A decision by the Court to overturn *Saucier*'s fixed-order analysis would subvert the rule of law by allowing lawless official behavior to commence and continue unchecked.[9]

A. Before *Saucier*, the law remained unclear and certain classes of Constitutional rights were repeatedly violated, leaving Plaintiffs with no option for relief.

There are classes of constitutional violations that nearly always arise under official discretion, and not

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[9] There is an increasing discussion regarding the role of judges in deciding policy issues that are best left to legislative bodies. Yet, judges who refuse to apply the law and who contribute to continued lawlessness are no less culpable than those accused of supplanting the people's representatives' policy preferences for their own. They may be, in fact, more culpable. The refusal to enforce laws specifically passed is at least as equally egregious to "finding" laws. The former is a specific and direct violation of legislative purpose.

written policy or custom.[10] Justice Kennedy's opinion in *Saucier* recognizes the law's need for guidance in such areas, thus guaranteeing that the same violation cannot continue indefinitely. Before *Saucier*, it was not uncommon for a string of similarly clear constitutional violations to continue unrestrained, either permanently or until official behavior became so outrageous that no legal haze could be credibly posited. In such cases, the law prior to suit would be insufficiently clear to deny qualified immunity, and thus immunity would be granted summarily with no elaboration of applicable law. The law would then remain unclear, and immunity would continue to be granted for future violations.

Such an inequitable result is illustrated in a line of cases beginning with *Doe v. Louisiana*, 2 F.3d 1412 (5th Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994). In *Doe*, two social workers manufactured evidence of sexual abuse in order to remove children from their father's custody. Granting the social workers qualified immunity, the court held that the defendants had not violated any clearly established law because the right to family integrity was "nebulous." *Id.* at 1417. In doing so, however, the court failed to remedy the alleged nebulous nature of the proffered right by

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[10] *See, e.g.*, *Jordan v. Murphy*, 145 Fed. Appx. 513 (6th Cir. 2005) (child seizure case); *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994) (discriminatory zoning case); *Barrow v. Greenville Indep. Sch. Dist.*, 480 F.3d 377 (5th Cir. 2007) (discriminatory hiring case).

determining whether a right had in fact been violated. Thus, in a subsequent child seizure case, *Kiser v. Garrett*, 67 F.3d 1166 (5th Cir. 1995), the Court again awarded qualified immunity to defendant social workers due to the "nebulous" nature of the right to family integrity. Predictably, the court once more failed to establish any parameters to clearly define the right for future child seizure cases. The law thus remained unclear, providing no guidance to this recognized but as yet unclarified right.

Later, both *Doe* and *Kiser* were used as justification to award qualified immunity in yet another child seizure case and show that the right of family integrity was insufficiently defined. The Court found "that neither *Doe* [n]or *Kiser* provide much guidance to state employees charged with investigating possible child abuse," and that therefore there was no violation of a clearly established law. *Strain v. Kaufman County Dist. Attorney's Office*, 23 F. Supp. 2d 685, 691 (N.D. Tex. 1998).[11] A number of other unreported cases followed this same approach.

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[11] The application of the constitutional right of family integrity to child seizure cases was not reached in the Fifth Circuit until a four-year-old child was removed from her parents for *three years* after purportedly typing out descriptions of parental sexual abuse, even though the state recognized within six months that the child could neither read nor even comprehend her own alleged descriptions. The district court concluded the official misconduct in this case was so grave that it "*clearly* shock[ed] the conscience." *Morris v. Dearborne*, 69 F. Supp. 2d 868, 885 (E.D. Tex. 1999); *see Morris v. Dearborne*, 181 F.3d 657

(Continued on following page)

Real constitutional violations can never be redressed under such an approach, despite legislatively passed law to the contrary. Pre-*Saucier*, a judge-made approach was allowed to perpetually trump Section 1983, a statute passed to allow for redress for actual constitutional violations.

By not addressing the question of whether a violation occurred, courts would indirectly ensure that future violations of law could not be addressed as the law would not be clearly established.

B. *Saucier* corrected the problem of perpetually non-litigable civil rights violations.

Without compromising the rights of officials who act in good faith under unsettled law, *Saucier* ensures that any legal haze encountered in civil rights actions will not persist and that applicable rights will be protected against future violation[12] as intended by

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(5th Cir. 1999). Had the Fifth Circuit in an earlier case done the constitutional analysis now required by *Saucier*, parents would not have had to wait for such an egregious violation before officials were required to respect the right of family integrity and not abduct children.

[12] Amici have argued that "qualified immunity's purpose is not to develop constitutional law prospectively [but] it exists as a defense from suit for all but the most seriously incompetent actors," and that *Saucier*'s first prong should therefore be applied only when it favors the state actor. Brief for the Texas Ass'n of School Boards as Amicus Curiae Supporting Respondents at 4-5, *Pearson v. Callahan*, No. 07-751 (Docketed Dec. 6,

(Continued on following page)

Section 1983. Already, adherence to *Saucier* has resulted in further clarification of the law. In *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003), a child was removed from his classroom by a social worker for questioning about abuse without the requisite reasonable suspicion of abuse. As the law was not clearly established at the time of the incident, the social worker was granted qualified immunity. In accordance with *Saucier*, however, the Seventh Circuit analyzed the student's claim of a constitutional right and recognized the social worker's actions as a violation of the Fourth Amendment. Due to *Saucier*'s fixed-order analysis, *Doe v. Heck* provided clearly established law for subsequent cases such as *Michael C. v. Gresbach*, 526 F.3d 1008 (7th Cir. 2008).

In *Michael C.*, a social worker removed two students from their classrooms and performed an under-the-clothes examination of their bodies without a warrant or parental permission. The Court recognized the precedent established by *Doe* and therefore refused to grant the social worker qualified immunity. The Court "reiterate[d] *Heck's* definitive holding, along the lines of the Fourth Amendment principles outlined above, that it is a violation of a child's constitutional rights to conduct a search of a child at a

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2007). This seriously misapprehends the point of *Saucier*. The first prong exists not to extend qualified immunity for lawless actors but to balance it against the need for relief from constitutional violations, as intended by Congress in enacting Section 1983.

private school without a warrant or probable cause, consent, or exigent circumstances." *Id.* at 1018. Had the *Doe* Court not previously undergone the requisite constitutional analysis required by *Saucier* to clearly define the law, but had instead merely found no clearly established violation and ended its analysis, the caseworker in *Michael C.* would have been granted qualified immunity and similar violations would have continued unchecked.

Other circuits have had similar success under *Saucier*, as well. In *Robinson v. Solano County*, 278 F.3d 1007 (9th Cir. 2002), the Ninth Circuit established that a police officer's unnecessary use of a drawn gun to threaten a civilian was a Fourth Amendment violation. The *Robinson* Court then granted qualified immunity to the officers in question, as the law was not clearly established at the time. Following this established right as articulated in *Robinson*, in *Hepner v. Balaam*, 2007 U.S. Dist. LEXIS 50495 (D. Nev. July 10, 2007), the District Court for the District of Nevada refused to grant qualified immunity to police officers who had unnecessarily drawn their guns on a civilian at a traffic stop. The District Court stated that "[g]iven the Ninth Circuit's opinion in *Robinson*, we think it was clearly established in 2003 that pointing weapons at unarmed suspects after determining that they were not armed would violate the suspects' constitutional rights." *Id.* at 16.

Some have raised concerns that *Saucier* will lead to non-appealable constitutional mistakes when an

erroneous decision is made regarding the constitutionality of a claimed right and immunity is subsequently granted. This, in theory, would result in "chill[ing] borderline but legal official conduct" on the part of government officials. Brief for the Texas Ass'n. of School Boards as Amicus Curiae Supporting Respondents at 3, *Pearson v. Callahan*, No. 07-751 (Docketed Dec. 6, 2007). Such concern does not suffice as a reason to overturn *Saucier* for two reasons.

First, if officials are sued for behavior that they desire to continue, they have an incentive to appeal or cross-appeal, as exemplified in *Boyd v. Benton County*, 374 F.3d 773 (9th Cir. 2004). Amicus would even support a rule exempting *Saucier* cases from the general prohibition against appeal by a victorious party. *See Bunting v. Mellen*, 541 U.S. 1019 (2004) (Scalia, J., dissenting).

Second, the criticism of *Saucier* regarding split-prong unreviewability is based on a desire to avoid a situation where an erroneous state of the law persists without possibility of correction. Yet precisely this situation would present itself if *Saucier* were overruled and the harm would be much more egregious. As before, it would become practically impossible to reach the constitutional merits in several classes of constitutional violations, leaving the law unclear and rendering qualified immunity an unintended shield for repeated violations of civil rights by government lawbreakers. The legal landscape without *Saucier* would be far worse than that under *Saucier* with appropriate appellate rule modifications. Rather than

erroneous constitutional law propagated only when courts made incorrect, unappealed decisions about borderline government behavior, whole groups of civil rights would lie effectively unprotected and unenforceable due to lack of judicial elaboration of the law.

Saucier additionally mitigates the harm caused by incorrect qualified immunity decisions. In *Hope v. Pelzer*, 536 U.S. 730 (2002), for example, the magistrate and district courts never considered the constitutionality of the official conduct in question. Instead, they simply found that the prison guards, who had tied Hope to a hitching post and "made him take off his shirt, [where] he remained shirtless all day while the sun burned his skin," *id.* at 734-35, were due qualified immunity based on the "clearly established" test. The Circuit Court, however, though upholding qualified immunity, properly adhered to *Saucier*'s fixed-order analysis and declared the guards' behavior a violation of the Eighth Amendment, clearly establishing the applicable law. Thus, while the Court erroneously upheld qualified immunity, *Saucier*'s order of analysis ensured that future abuses would not go unrectified even had this Court not granted *certiorari*. As this Court cannot review every erroneous award of qualified immunity by the lower courts, the importance of *Saucier*'s function in mitigating such errors and promoting judicial efficiency cannot be overstated.

Without *Saucier*, judges could be tempted to supplant the rule of law with their own policy choices. The two-step approach secures for every American

the rigid application of the rule of law, regardless of the policy preferences of a particular judge or set of judges. When a court must articulate and define the scope of the inalienable right violated in a case, the court has far less room to diverge into a preferred public policy position. Certainly, there is no talisman to ward off all such departures from the rule of law, but such mandatory transparency serves an important role in protecting the inalienable rights secured and preserved at great cost for more than two centuries.

II. There are alternatives to overturning *Saucier* that alleviate the Court's likely concerns while preventing unnecessary hindrance to elaboration of the law.

Should this Court nonetheless find that *Saucier* places too great a burden on the lower courts, there are modest modifications to *Saucier*'s fixed-order analysis that would satisfy any likely objections to its continued employment. *Saucier* need not be overruled altogether.

Amici have argued that *Saucier*'s two-step rule "requires constitutional decisionmaking without sufficient argument or record evidence." Brief for the States of Illinois, et al., as Amicus Curiae Supporting Respondents at 19, *Pearson v. Callahan,* No. 07-751 (Docketed Dec. 6, 2007). This concern is easily resolved by the addition of a heightened pleading standard for all cases involving qualified immunity

where an official is being sued in his individual capacity. Such a heightened standard already has been adopted by the Fifth Circuit, as articulated in *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985), and *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995). To further the utility of this heightened standard the Court could allow plaintiffs to waive *Saucier*'s requirement that the Court determine the constitutionality of the claimed right before ruling on qualified immunity. If after notice and opportunity to amend, a plaintiff fails to meet the higher pleading standard, or fails to brief the required constitutional issues, such failure would constitute waiver. A heightened pleading standard adhering to these guidelines would ensure that judges have sufficient briefing and evidence to make an informed decision on any constitutional issues while allowing plaintiffs the opportunity to bypass this requirement if they find it to be unessential to their case.

Additionally, should this Court find that it would alleviate real or perceived problems with the *Saucier* test, Amicus would support the second modification suggested by Petitioners that Fourth Amendment claims involving the fruit-of-the-poisonous-tree doctrine be exempted from the first prong of the *Saucier* test. Brief for Petitioners at 57-60, *Pearson v. Callahan*, No. 07-751 (Docketed Dec. 6, 2007). Although "the *Saucier* rule is quite important to the development of [Fourth Amendment] law in areas that do not arise in motions to suppress," *id.* at 59, poisonous-tree situations have ample opportunities for litigation

in contexts that do not involve qualified immunity and do not depend on *Saucier* for elaboration of the law. This modification could greatly improve judicial efficiency without threatening the enforcement of civil rights and the rule of law.

III. *Saucier* serves the irreplaceable purpose of ensuring policy decisions regarding official misconduct are properly guarded by the legislature and not by the preferences of well-meaning judges.

The very purpose of Congress and other elected bodies is to make public policy decisions, such as enacting Section 1983, to enforce inalienable rights. Courts should not supplant such policy initiatives with their own preferences regarding the desirability to enforce the rule of law.

> "The members of the Legislative department . . . are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society . . . [and so] they are more immediately the confidential guardians of their rights and liberties."[13]

As Thomas Jefferson expounded in a letter to Judge Spencer Roane:

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[13] THE FEDERALIST NO. 49, at 275 (Alexander Hamilton) (Benjamin Warner, ed., 1818).

> "our Constitution . . . intending to establish three departments, co-ordinate and independent that they might check and balance one another, it has given – according to this opinion – to one of them alone the right to prescribe rules for the government of the others; and to that one, too, which is unelected by and independent of the nation . . . The Constitution, on this hypothesis, is a mere thing of wax in the hands of the Judiciary which they may twist and shape into any form they please."[14]

Rufus King, signer of the Constitution, warned during the Constitutional Convention that "the judges must interpret the laws; they ought not be legislators." THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. I, 108 (Max Farrand ed., Yale University Press 1911), (from Rufus King's records of the Convention from Monday, June 4, 1787).[15]

It is the role of courts to enforce the laws, including the inalienable rights secured by the Constitution, because Congress made a public policy decision to enact Section 1983 to require such enforcement.

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[14] THOMAS JEFFERSON, WRITINGS OF THOMAS JEFFERSON, VOL. XV, 215 (Albert Ellery Bergh ed., Thomas Jefferson Memorial Association 1904) (Letter from Thomas Jefferson to Judge Spencer Roane, Sept. 6, 1819).

[15] Alexander Hamilton explained in FEDERALIST NO. 81, "there is not a syllable in the plan [Constitution] which directly empowers the national courts to construe the laws according to the spirit of the Constitution." THE FEDERALIST NO. 81, at 436 (Alexander Hamilton) (Benjamin Warner, ed., 1818).

Saucier secures judicial transparency and serves to prevent courts from deviating from their enforcement role into a public policy realm never intended for them. Congress enacts the laws, Congress enacted the procedural vehicles used to obtain justice in civil rights cases, and Congress is the proper vestige for policy decisions regarding the law. Courts should not be able to create a court-made rule in order to perpetually deprive citizens of the rights to which they are entitled under law, a law in fact passed specifically to allow for redress of actual constitutional violations.

When the people, through their elected representatives, choose to follow a policy of enforcing constitutional rights through the courts, such as enacting Section 1983, no court should dilute those rights by subverting the rule of law and avoiding the legal issue when a violation has taken place. Courts must not be given an opportunity to cloak their decisions in mystery by granting qualified immunity for these constitutional violations without the necessary analysis to prevent the next violation. Whether intended or not, the pre-*Saucier* approach runs specifically contrary to the legislative purposes of Section 1983 and leads to the subversion of the rule of law and continued violations of inalienable rights. *Saucier* is an appropriate and necessary buttress against any tendency to supplant judicial wisdom for the wisdom of the people and provides transparency for future cases.

Saucier is an important case that helps protect the speech, religious and civil rights of American citizens from lawless official behavior without compromising the qualified immunity of government officials who act in good faith. It has relieved much of the tension between the qualified immunity doctrine and the protection of basic civil rights, and if in a few types of cases it causes a slightly increased workload for the judiciary, such a discrepancy can be corrected with minor rule changes without gutting *Saucier* itself. *Saucier* serves as an important check on any judge who may be tempted to deviate from enforcing the law to pursue public policy initiatives. The *Saucier* transparency keeps courts honest, serves the noble goal of respecting our inalienable rights and prevents rampant and continued violations from continuing in perpetuity.

CONCLUSION

For the foregoing reasons, Amicus respectfully submits that this Court should not overrule *Saucier v. Katz*. Courts require the *Saucier* transparency to adequately enforce the rule of law and respect the inalienable rights our Founding Fathers sacrificed so much to secure.

Respectfully submitted,

KELLY J. SHACKELFORD
Counsel of Record
HIRAM S. SASSER III
ROGER L. BYRON
LIBERTY LEGAL INSTITUTE
903 E. 18th Ste. 230
Plano, Texas 75074
Telephone (972) 423-3131
Facsimile (972) 423-6570

Counsel for Amicus Curiae